Office-Supreme Court, U.S.
FILED
SEP 10 1983
ALEXANDER L. STEVAS
CLERK

NO. 82-963
NO. 82-1711
NO. 82-1771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,
v.
OSBORNE SHEPPARD, *Respondent*.

STATE OF COLORADO, *Petitioner*,
v.
FIDEL QUINTERO, *Respondent*.

UNITED STATES OF AMERICA, *Petitioner*,
v.
ALBERTO ANTONIO LEON, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Massachusetts, The Supreme Court of Colorado, and the United States Court of Appeals for the Ninth Circuit, Respectively

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BRIEF OF AMICI CURIAE, SEVEN FORMER MEMBERS OF THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, THE LEGAL FOUNDATION OF AMERICA, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., ET AL.*, IN SUPPORT OF PETITIONERS

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TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION,
by Tom Krampitz, Executive Director;

SOUTHEASTERN LEGAL FOUNDATION,
by Hon. Ben B. Blackburn, President; and

VICTIM ASSISTANCE LEGAL ORGANIZATION, INC.

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INTEREST OF AMICI CURIAE

Because of their number,* amici will be described in groups.

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* A similar group of amici appeared last term in Illinois v. Gates, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983). At that time, the Clerk's office advised that as many amici as possible be consolidated in a single brief to minimize imposition upon the Court. Amici herein have attempted to comply with that advice, and hence this brief reflects the joinder of several different categories of amici.

I. *Seven Former Members of the Task Force on Violent Crime of the Attorney General of the United States.* On April 10, 1981, the Attorney General of the United States convened a Task Force on Violent Crime. The objective of the Task Force was to make specific recommendations to the Attorney General concerning ways in which the federal government could combat violent crime.

Members of the Task Force were:

Honorable Griffin B. Bell, Esq., Former Attorney General of the United States; Former Judge, U. S. Court of Appeals for the Fifth Circuit, Co-Chairman.

Honorable James R. Thompson, Esq., Governor of Illinois, Co-Chairman.

Honorable David L. Armstrong, Esq., District Attorney, Jefferson County (Louisville), Kentucky.

Frank G. Carrington, Esq., Executive Director, Crime Victims Legal Organization.

Robert L. Edwards, Director, Local Law Enforcement Assistance, Florida Department of Law Enforcement.

William L. Hart, Chief of Police, Detroit, Michigan.

Honorable Wilbur F. Littlefield, Public Defender, Los Angeles County.

Professor James Q. Wilson, School of Government, Harvard University.

One of the recommendations (No. 40) made to the Attorney General by the Task Force read, in pertinent part:

> **In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution . . . We recommend that the Attorney General instruct United States Attorneys and the**

Solicitor General urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both.*

The Task Force dissolved on August 17, 1981, when it delivered its Final Report to the Attorney General. Thus, these amici are not an official government body but a group of *former* members. Amici hope, however, that, having taken lengthy testimony about the Rule during hearings, they might be able to assist this Court in reaching its conclusion.

II. *Peace Officers' Associations and Related Groups.* These organizations are designed to promote and foster police and prosecutor professionalism on the national and state levels. These amici include organizations from each of the States from which the present cases arise: The California Peace Officers' Association, County Sheriffs of Colorado, and Massachusetts Association of Chiefs of Police. In addition, these amici include the International Association of Chiefs of Police, Inc., the Illinois Association of Chiefs of Police, Inc., and the Texas District and County Attorneys Association, which is an association of elected district and county attorneys and their assistants in Texas.

III. *Public Interest Law Centers.* A number of centers, foundations, and other organizations that engage in research, litigation, education and public information on criminal justice matters are co-amici on this brief. They include Americans for Effective Law Enforcement, Inc.; The Legal Foundation of America; Southeastern Legal Foundation, Inc.; and Victims' Assistance Legal Organization, Inc.

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* Mr. Littlefield dissented from this recommendation; hence, his name is not associated with this brief. The Seven Members in the majority were Messrs. Bell, Thompson, Armstrong, Carrington, Edwards, Hart and Wilson, all of whom have requested that their names be associated with this brief.

IV. *Other Co-Amici: State of North Carolina, et. al.* Amici are also joined by the State of North Carolina, by and through the Hon. Rufus L. Edmisten, Esq., Attorney General, State of North Carolina, and David S. Crump, Esq., Deputy Attorney General.*

SUMMARY OF ARGUMENT

The "Deterrence" Rationale. The deterrence theory does not justify exclusion of evidence seized in good faith. The good faith standard that is sought is one based upon objective reasonableness. Given the complexity of search and seizure law, it is unlikely that greater deterrence can possibly result from the current rule of universal exclusion. The rule was originally addressed to flagrant misconduct, and a good faith standard would bring the law closer to its purposes. Such a standard would still require exclusion of bad faith searches, the courts would continue to consider such cases, and such remedies as section 1983 actually provide a more effective deterrent in any event.

The "Judicial Integrity" Rationale. Judicial integrity is not served by indiscriminate, universal exclusion. Without a good faith exception, the exclusionary rule actually decreases public respect for the courts. It (1) reinforces the public impression that criminal law is composed of dysfunctional technicalities; (2) is palpably disproportionate to the violation in many cases; (3) creates haphazard results upon guilt or innocence; (4) demoralizes the conscientious officer; (5) makes executive branch responsibility for police conduct more difficult to discharge; (6) places appellate courts in ostensibly shifting and inconsistent doctrinal positions; (7) encourages the accused to conclude that guilt or innocence is irrelevant; and (8) forces officers of the court to present facts untruthfully.

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* Amici wish to acknowledge the assistance of law student Chris Di Ferrante in the preparation of this brief.

ARGUMENT

I. THE DETERRENCE THEORY DOES NOT JUSTIFY EXCLUSION OF EVIDENCE SEIZED REASONABLY AND IN GOOD FAITH.

It is to be emphasized that the good faith standard Petitioners are seeking is an objective standard. As one court said, in adopting a similar objective standard,

> [T]he [search] . . . must be grounded in objective reasonableness. It must therefore be based upon articulable premises sufficient to cause . . . a reasonably trained officer to believe that he was acting lawfully. Thus a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment, could never qualify.[1]

There is no evidence that the present universal rule of exclusion accomplishes its purpose better than one based on objective good faith, and in fact there is evidence to the contrary.[2]

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1 Williams v. United States, 622 F. 2d 830 (5th Cir. 1980) (en banc). See also AELE Model Statute, cited in Hearings, note 9 infra, at 227. Although Williams refers to a test that is both objective and subjective, amici here would urge the Court to adopt an objective test.

2 The seminal work is Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 672, 678 (1970) (empirical study showing absence of deterrent effect and describing rationale as "fig leaf phrases used to cover naked ignorance"). Later, Professor Steven Schlesinger summarized several empirical studies, all of which concluded that deterrence could not be demonstrated, except one, which was inconclusive. S. SCHLESINGER, EXCLUSIONARY INJUSTICE 50-57 (1977). Cf. Comptroller Gen. of the United States,

A. *A person cannot be deterred effectively if he cannot be aware, with reasonable certainty, what it is that he is to be deterred from doing.*

As a matter of logic, it is unrealistic to expect more effective deterrence of disfavored conduct from a universal rule of exclusion than from one incorporating an objective good faith standard. The complexity of search and seizure law makes it unlikely that greater deterrence can possibly result.

The fragmentation of search and seizure opinions is illustrated by the syllabus to *United States v. Mendenhall*, 446 U. S. 554 (1980):

> Stewart, J., announced the court's judgment and delivered an opinion . . . . with respect to Parts I, II-B, II-C, and III, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, JJ., joined. Powell, J., filed an opinion concurring in part and concurring in the judgment, in which Burger, C. J., and Blackmun, J., joined. White, J., filed a dissenting opinion in which Brennan, Marshall, and Stevens, JJ., joined.

Amici submit that when Justices of the Court disagree over parts and sub-parts of a ruling, it is unrealistic to expect that a police officer, acting under the exigencies that are inherent in police work, should have a superior knowledge of the legal concepts that have split the Court. Such divisions are not unusual in search and seizure law. See also, e.g., *Rose v. Lundy*, 102 S. Ct. 1198 (1982); *Coolidge v. New Hampshire*, 403 U. S. 443 (1971).[3]

Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Rep. No. CGD-79-45 (19 April 1979) (GAO Study); National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982).

3 The Syllabus in Rose v. Lundy is as follows: J. O'Connor delivered the opinion of the court except as to Part III-C, J. Blackmun filed an opinion concurring in the judgment, J.

These difficulties are aggravated by what might be called the "pyramid effect." Each opinion of this Court is at the apex of our jurisprudence, and it is subsequently interpreted by federal courts of appeal, federal district courts, state supreme courts, state appellate courts and state trial courts. For example, Shepard's United States Citations, 1976 supplement, volume 4, lists 42 entries from United States Reports and approximately 1200 lower court entries citing *Mapp v. Ohio*, alone. Each reinterpretation shifts meanings, sometimes slightly, sometimes significantly. A good faith exception would not avoid these complexities, but it would recognize that all that can be expected of a police officer is that he act reasonably and in good faith.

In fact, the universal exclusionary rule is likely to frustrate the policy of deterrence in some instances. For example, it contravenes the fourth amendment preference for warrants, because it makes the showing of a valid search more difficult in the case of a warrant.[4] But more fundamentally, if the exclusionary rule is applied indiscriminately to bad faith misconduct

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Brennan filed an opinion concurring in part and dissenting in part, in which J. Marshall joined, J. White filed an opinion concurring in part and dissenting in part. J. Stevens filed a dissenting opinion.

The syllabus in Coolidge v. New Hampshire is as follows: Stewart, J., delivered the opinion of the court, in which Burger, C. J., (as to Part III) and Harlan (as to Parts I, II-D, and III), Douglas, Brennan, and Marshall, JJ., joined. Harlan, J., filed a concurring opinion, post, p. 490. Burger, C. J., filed a concurring and dissenting opinion, post, p. 492. Black, J., filed a concurring and dissenting opinion, in a portion of Part I and in Parts II and III of which Burger, C. J., and Blackmun, J., joined, post, p. 493. White, J., filed a concurring and dissenting opinion, in which Burger, C. J., joined, post, p. 510.

4 It is sometimes said that exclusion "deters" inadvertent errors by judges issuing warrants. Again, however, the remedy lacks proportionality; exclusion as a deterrent to reasonable conduct is unlikely to increase compliance. Furthermore, such a drastic remedy has never been invoked as to judges' conduct; indeed, judges are absolutely immune to 1983 actions for civil rights violations (even intentional ones), on the theory that they need

and to reasonable, good-faith searches, it cannot have the educational function that its proponents attribute to it. It is more likely to frustrate those who try to comply with it, and frustration is not an effective tool of either education or motivation.

B. The original purpose of the exclusionary rule was addressed to flagrant police misconduct.

Originally, the exclusionary rule was intended to deter "official lawlessness in *flagrant* abuse" of the Constitution.[5] *Mapp v. Ohio*, 367 U. S. 643, 655 (1961) (emphasis added). That the criminal should go free was unfortunate, but it would be far worse for courts "to declare that the Government may *commit crimes* in order to secure the conviction of a private criminal . . . . " *Elkins v. United States*, 364 U. S. 206, 223 (1960) (emphasis added), quoting from *Olmstead v. United States*, 277 U. S. 438, 485 (1928) (Brandeis, J. dissenting).[6]

This was the original theory of the exclusionary rule. But in recent years the rule has been applied in cases in which there has been no police misconduct and in which the police have behaved reasonably in all respects, such as the cases at bar. Evidence has been suppressed simply because the police, or the magistrate upon whom they relied, made a reasonable judgment as to some factual, practical matter, such as the existence of probable cause, with which the court subsequently reviewing their conduct disagreed. Recognition of a good faith exception would go far toward bringing the rule back to its original purpose.

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to be free to decide fearlessly; to use a suppression remedy as a "deterrent" to judges would be anomalous.

5 Much of this discussion originated with the Brief of Petitioner State of Illinois, Illinois v. Gates, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983) (on rehearing).

6 The "judicial integrity" rationale supports the same view of the exclusionary rule. See Part II of this Brief, infra.

C. *The recognition of a good faith exception will not impair either the deterrence that is attributed to the exclusionary rule or the more effective deterrence that actually results from other remedies.*

The recognition of a constitutional right does not imply that any particular remedy is exclusive. This Court has always recognized the difference between rights and remedies. It has consistently attempted to choose remedies by pragmatic considerations, rather than by doctrines bound to the right that is to be enforced. The choice of one remedy rather than another by a practical calculus of advantages and disadvantages has never been thought to imply any devaluation of the right at issue, nor should it here. [7]

(1) Evidence resulting from bad-faith misconduct will continue to be excluded, and the law of search and seizure will continue to develop.

The law of search and seizure is sufficiently clear in many instances that its violation cannot be characterized as reasonable or in good faith. Extreme examples would include arrests at will of anyone who has previously been convicted of crime, cf. *Beck v. Ohio*, 397 U. S. 89 (1964); dragnet arrests of anyone who might be remotely suspected of crime, cf. *Davis v. Mississippi*, 394 U. S. 721 (1969); surreptitious violations of wiretap statutes, cf. *Alderman v. United States*, 394 U. S. 165 (1969); or unwarranted and unauthorized entry into private premises or residences in the absence of any claim of exigent circumstances, cf. *Ehrlichman v. United States*, 546 F. 2d 910 (D. C. Cir. 1976) (denying good faith defense in criminal prosecution for government official's break-in of office). Amici applaud the basic principles underlying such decisions, and we would point out that

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7 The Memoirs of Mr. Justice Douglas indicate that the Court actually focussed its consideration upon three alternative remedial devices before choosing the exclusionary rule. W. DOUGLAS, THE COURT YEARS 387 (1980).

there are many other situations in which the law is sufficiently clear, or the violation sufficiently serious, that no one could contend that a search or seizure was in good faith. In such clear situations, exclusion of the evidence would follow because the good faith exception advocated here simply would not apply.

For these reasons, the law of search and seizure will continue to develop after a good faith exception is adopted. Good faith and reasonableness do not become relevant issues in the case until there has been a determination in the first instance that the law of search and seizure would otherwise require exclusion. Furthermore, good faith and reasonableness are inseparable from the development of the law, because the *objective* reasonableness of the officer's conduct must always be tested against the law. As one commentator has written, "A reasonable, good faith standard, by retaining an objective element, permits, even necessitates, judicial review." [8] Opponents' objections to the effect that a good faith exception might make rulings on fourth amendment issues "impossible," cf. Brief for American Bar Association as Amicus Curiae at 17 in *Illinois v. Gates*, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983), are not well taken.

But perhaps the most convincing evidence that the good faith exception would not lead to an atrophy of fourth amendment values comes from the Fifth and Eleventh Circuits. Testimony before the Congress, in its consideration of a statutory alternative to the universal exclusionary rule, indicates no abuse of the good faith exception adopted by both Circuits,[9] and both

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8 Bernardi, The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment? 30 De Paul L. Rev. 51, 101 (1980).

9 Support for Exclusionary Rule Modification to Provide for Admissibility of Evidence Obtained by a Law Enforcement Officer Acting in Good Faith, 1982: Hearings on S. 101, S. 751 and relevant portions of S. 1995, before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 2nd Sess. 226-27 (1982).

have continued to decide search and seizure issues in a manner that has continued the development of the law.

(2) There exist more effective remedies against police misconduct.

In contrast to the inefficiency of a universal exclusionary rule, 42 U. S. C. sec. 1983 (1964) (the civil rights damage statute) provides a highly effective deterrent. In situations involving bad faith searches, the damage remedy provides a powerful punitive measure against individual officers. Furthermore, municipalities or other government entities do not have any defense of good faith in 1983 actions. *Owen v. City of Independence*, 445 U. S. 622 (1980). They can thus be held liable for damages caused by a search that is ultimately determined to be unlawful, even if they act in good faith. Claims against municipalities are recognized if the damage is caused by an "official policy" of the municipality,[10] but an official policy need not be formal, and it can be evidenced by such inactions as failure to train officers properly, inadequate supervision, or toleration.[11] It should be reiterated that a bad faith seizure would continue to require suppression under the proposed approach, and thus whatever deterrence can result from suppression would be preserved; but what is more significant is that the "pure hearted" constable referred to above, who committed breakins because he had "never heard of the fourth amendment," would not only see the resulting evidence suppressed, but would himself likely be liable in damages *and* would make his municipality liable because he had been inadequately trained.

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10 Monell v. Dep't of Social Serv., 436 U. S. 658 (1978).

11 Owens v. Haas, 601 F. 2d 1242 (2nd Cir. 1979), cert. denied sub nom. County of Nassau v. Owens, 444 U. S. 980, 100 S. Ct. 483, 62 L. Ed. 2d 407 (1979); Turpin v. Mailet, 619 F. 2d 196 (2nd Cir.), cert. denied sub nom. Turpin v. West Haven, 449 U. S. 1016, 101 S. Ct. 577, 66 L. Ed. 2d 475 (1980). See also Webster v. City of Houston, 689 F. 2d 1220 (5th Cir. 1982).

As this Court has said, "The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best." *Irvine v. California*, 347 U. S. 128, 136-37 (1954) (plurality opinion). While few remedies are perfect, the 1983 remedy is far superior. It provides a direct protection to innocent victims of unlawful police conduct, and in the case of municipal liability it does so even if the unlawful acts are committed in good faith. Furthermore, it places the onus on the person or entity whose action caused the violation. The direct benefits of the exclusionary rule are available only to guilty criminals, and perhaps more importantly, the object of its punishment is the society at large.

II. A GOOD FAITH EXCEPTION IS FULLY CONSISTENT WITH THE "JUDICIAL INTEGRITY" RATIONALE.

A. The "judicial integrity" rationale is not served by the exclusion of evidence seized reasonably and in good faith. Rather, the needless and counterproductive exclusion of such evidence itself impairs judicial integrity.

A second principle that is sometimes said to underlie the exclusionary rule is that courts should avoid the taint of illegally seized evidence. E.g., *Mapp v. Ohio*, 367 U. S. 643 (1961). Courts are nondemocratic institutions without independent enforcement mechanisms. If their orders are to prevail in unpopular as well as popular causes, they must have public respect.

To the extent that there is validity to this rationale, it is the exclusion of evidence honestly and reasonably seized, not its reception, that actually impairs judicial integrity.

(1) Impairment of judicial integrity through the public impression of criminal law as a mass of technicalities.

The first way in which the exclusion of honestly and reasonably seized evidence taints a court is by creating a public impression that the criminal law is a mass of dysfunctional technical-

ities. This danger was articulated by Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U. S. 97, 122 (1934), as follows:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

Although the error in *Snyder* was exclusion of the defendant from the proceedings and an improper remark by the trial judge, rather than an illegal seizure, the reasoning applies equally to the cases at bar.

(2) Harm to judicial integrity because the rule is generally disproportionate in its effects to the violation.

Secondly, proportionality is such an important value in the criminal law that it is typically examined by every first-year law student. But the current enforcement of the exclusionary rule is seriously inconsistent with this fundamental principle. Cf. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 155-67 (3rd ed. 1975). Such philosophers as Bentham, Hart, Stephen, and Feinberg have emphasized the disrespect that the law engenders when its response is disproportionate to the severity of an alleged violation. Id. As Mr. Chief Justice Burger said in dissent in *Bivens v. Six Unknown Agents*, 403 U. S. 388, 419 (1971), "Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way."

In one of the decisions below, a relatively slight and honest oversight in conditions of great time pressure caused the exclusion of crucial evidence gained by excellent police work, against a murderer who burned the unconscious but living body of his victim with gasoline. *Commonwealth v. Sheppard*, 441 N. E. 2d

725 (Mass. 1982). All who are affected by the case must feel that this all-or-nothing approach is disproportionate.

(3) Impairment of judicial integrity by haphazard results on guilt or innocence.

Third, exclusion of reasonably and honestly seized evidence taints the criminal justice system by causing haphazard adjudication of guilt or innocence. Inconsistent results are sometimes unavoidable under the Constitution, but they should not be encouraged when unnecessary.

An incident that occurred several years ago in Harris County (Houston), Texas illustrates the point. The District Attorney presented seventy-three drug possession cases, some of which were appropriate for no-bills because of searches that would require suppression, and some of which were appropriate for true bills because of searches deemed valid. The grand jury, however, no-billed all cases in both groups, in part because it was unable to rationalize differential treatment of the persons involved on the basis of what the grand jurors apparently regarded as irrational distinctions. Interview with James Larkin, Assistant District Attorney of Harris County, Texas, in Houston, Nov. 24, 1980. The haphazard adjudication that this grand jury impliedly condemned would not be removed by a good faith exception, but it would be lessened.

(4) Impairment of judicial integrity owing to a demoralizing effect upon the honest and conscientious police officer.

Fourth, exclusion of reasonably and honestly seized evidence taints the courts by demoralizing the conscientious police officer, making him less likely, not more likely, to understand and follow fourth amendment decisions. Fourth amendment law immediately dissolves into ambiguity in a concrete factual situation. The variety of probable cause judgments is infinite. It is overlaid by a bewildering array of doctrines such as plain view, stop and frisk, inventory, exigent circumstances, and consent. Procedural considerations such as standing and burden of proof

influence a variety of cases. The officer will see a seemingly reasonable seizure struck down in one case and a borderline one upheld in the next.

Even experts complain that they cannot understand search and seizure law. As two prominent criminal defense lawyers have written,

> In determining the balance, guidelines have been spelled out by the Supreme Court. A great deal of difficulty arises in applying the many guidelines to a particular set of facts .... [T]he decisions dealing with search and seizure appear to be in a constant state of change.

Rawitscher & Carnahan, *Search and Seizure and Suppression Proceedings*, in STATE BAR OF TEXAS, ADVANCED CRIMINAL LAW COURSE (D. Crump ed. 1979). If the decisions induce this reaction in a criminal law scholar, they must resemble a roulette wheel to the officer who risks his life in good faith, only to be told that his conduct was "illegal" and must be "deterred" by suppression. Research confirms what common sense suggests: aberrational acts of misconduct are most common in situations in which individuals, including police officers, perceive that they are unlikely to obtain justice in the court system. Cf. N. JOHNSON, L. SAVITZ & M. WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 11 (1962).

The three cases at bar are an example. In *Colorado v. Quintero*, it can only engender disrespect for courts if the officers are told they acted illegally, when they honestly and quite reasonably made the judgment, in the field, that probable cause existed, and their only other choice was to let the suspect leave with property of victims that any ordinary person would conclude was stolen. In *Leon* and *Sheppard*, the officers acted on the authority of warrants issued, from all that appears, by courts acting as they sincerely deemed the law required; and for the officers to fail to execute such a warrant would have been, itself, an act of disobedience of a court order. Yet in response to their obedience, the officers are told by the suppression order that

their conduct was "willfully" unlawful, to use the words of *Michigan v. Tucker*, 417 U. S. 433, 477 (1974).

(5) Impairment of judicial integrity because of the difficulty of a court's performing a task given to the executive, that of maintaining detailed policies for police performance.

The executive is the branch charged with supervision of the details of law enforcement. Efforts by courts to maintain detailed supervision of police performance are an erosion of the separation of powers and are likely to impair the ability or motivation of the executive to undertake the task. The essence of professionalism is repeatable procedures, and the confusing overlay of doctrines in search and seizure frustrates the ability of the executive to prescribe uniform conduct. It also dilutes the public perception of the locus of responsibility. Furthermore, the "secondhand" control of the exclusionary rule is simply ineffective to supervise with the kind of detail the courts have attempted, making the courts themselves appear ineffectual. If the conduct is seriously inconsistent with law, suppression may be more clearly justified, but this result would follow from the recognition of a good faith exception.

(6) Impairment of judicial integrity by the appearance of shifting and inconsistent appellate decision-making.

Sixth, the present administration of the exclusionary rule places appellate courts in ostensibly shifting and inconsistent doctrinal positions. This Court has withheld suppression when the illegality has been attenuated by intervening events, the defendant has lacked standing, the challenge has arisen in a habeas corpus action, use of the evidence was before the grand jury, use was for impeachment, or the resulting arrest was used to increase sentence in another case.[12] On occasion, doctrinal

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12 United States v. Ceccolini, 435 U. S. 368 (1978); Stone v. Powell, 428 U. S. 465 (1976); United States v. Peltier, 422 U. S.

justification fails to prevent the appearance of a zig-zag course; this is especially so in cases involving vehicles taken to another location, containers, and searches incident to arrest.[13] These difficulties are the natural result of practical efforts with conflicting policy, but they create a nagging suspicion that interpretive principles cannot be reconciled with a reasonable view of the fourth amendment. Often, the true reason for admitting evidence is that the officer has acted honestly and reasonably, and explicit recognition of this reason would bring the law into line with its purposes.

(7) Impairment of judicial integrity by the effect on the accused: The perceived irrelevance of guilt or innocence.

Seventh, the exclusionary rule taints the criminal justice system by inducing the accused to believe that his guilt or innocence is not important. One popular author has written that "innocence becomes less relevant" as the criminal justice system progresses. F. L. BAILEY, THE DEFENSE NEVER RESTS 1 (1968). Disparate treatment creates cynicism in the accused. It has been identified by wardens in some states as a greater cause of prison unrest than food, overcrowding, or conditions of incar-

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531 (1975); Michigan v. Tucker, 417 U. S. 433 (1974); United States v. Calandra, 414 U. S. 338 (1974); United States v. Tucker, 404 U. S. 433 (1972); Harris v. New York, 401 U. S. 222 (1971).

13 With respect to automobile searches, compare Chambers v. Maroney, 399 U. S. 42 (1970); Preston v. United States, 376 U. S. 364 (1964); Husty v. United States, 282 U. S. 694 (1931); and Carroll v. United States, 267 U. S. 132 (1925) with Arkansas v. Sanders, 442 U. S. 753 (1979); Texas v. White, 423 U. S. 67 (1975); Coolidge v. New Hampshire, 403 U. S. 42 (1971). With respect to containers, compare United States v. Ross, 102 S. Ct. 2157 (1982) with Arkansas v. Saunders, 442 U. S. 753 (1979). As to searches incident to arrest, compare United States v. Rabinowitz, 339 U. S. 56 (1960) (overruling prior authority) with Chimel v. California, 395 U. S. 752 (1969) (overruling Rabinowitz).

ceration. COUNCIL ON STATE GOVERNMENTS, DEFINITE SENTENCING 10 (1976). Although this finding was stated in the context of sentencing disparity, the same kind of prisoner cynicism is likely to be generated when disparity is caused by the exclusionary rule.

(8) Untruthful fact presentation to jurors by officers of the court.

Finally, the exclusion of reasonably and honestly seized evidence taints the criminal justice system by presenting an untruthful impression to the trier of fact. A conscientious defense lawyer is likely to argue to the jury that the government has not presented sufficient evidence in a trial from which evidence has been suppressed. He is likely to follow with criticism of the government for prosecution of the case without the type of evidence that is missing.[14]

If the seizure is flagrantly improper, suppression may be justifiable; however, a juror is likely to feel that he has been unfairly tricked if he learns that the truth has been hidden from him by officers of the court notwithstanding a reasonable, good-faith search. Perhaps the saddest effect of this misrepresentation is its effect upon defense counsel. It is understandable that many attorneys avoid the criminal defense practice because they do not wish to be the tools of such deception.

B. The "judicial integrity" rationale is circular when it is used to exclude evidence seized reasonably and in good faith.

The label of "illegality" in search and seizure law does not, by itself, adjudge the integrity of the officer's conduct. Often,

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14 The "open door" or reply doctrine would allow prosecution response if defense counsel referred by name to the specific item suppressed, but through the exercise of minimal skill, defense counsel can make a general enough reference to prevent response and still get the point across.

the label is affixed in spite of recognition that an officer has acted reasonably and sincerely (as in the present cases), and it represents only a conclusion that the policies of the fourth amendment would be best served in a pragmatic way by exclusion or that case authority so interprets those policies. But when a court has thus determined illegality without regard to the *actual* propriety of the acts leading to the seizure, there is an absence of logic in the assertion that the label of "illegality" the court has itself thus affixed to the evidence would undermine its integrity. In these circumstances, in other words, it is circular to say that judicial integrity demands exclusion.

CONCLUSION

The recognition of an objective good-faith standard is not made inappropriate by the deterrence theory. The complexity of search and seizure makes it unlikely that greater deterrence can possibly result from universal exclusion. Bad faith searches would still require exclusion, the courts would continue to consider such cases, and such remedies as section 1983 actually provide more effective deterrence than exclusion in any event.

Furthermore, the recognition of a good-faith exception to the judicially created rule of exclusion would not impair judicial integrity. Instead, it is the unnecessary and counterproductive exclusion of evidence seized reasonably and in good faith that actually threatens to impair public respect for courts. The decisions below should be reversed.

Respectfully submitted,

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